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March 12, 2007*

Attorneys for Fertitta Enterprises, Inc.

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In re:

USA COMMERCIAL MORTGAGE COMPANY,
Debtor.

Case No. BK-S-06-10725-LBR
Case No. BK-S-06-10726-LBR
Case No. BK-S-06-10727-LBR
Case No. BK-S-06-10728-LBR
Case No. BK-S-06-10729-LBR

USA CAPITAL REALTY ADVISORS, LLC,
Debtor.

Chapter 11

USA CAPITAL DIVERSIFIED TRUST DEED FUND,
LLC, Debtor.

**FERTITTA ENTERPRISES,
INC.'S OPPOSITION TO
DEBTORS' MOTION TO
AUTHORIZE DEBTOR USA
COMMERCIAL MORTGAGE
COMPANY AS LOAN SERVICER
TO ACCEPT PAYMENTS AND
PROVIDE RECONVEYANCES
FOR TWO COLT GATEWAY
LOANS, WITH CERTIFICATE OF
SERVICE**

**USA CAPITAL FIRST TRUST DEED FUND, LLC,
Debtor.**

Hearing Date: March 15, 2007
Hearing Time: 9:30 am

Affects:

- All Debtors
 - USA Commercial Mortgage Company
 - USA Capital Realty Advisors, LLC
 - USA Capital Diversified Trust Deed Fund, LLC
 - USA Capital First Trust Deed Fund, LLC
 - USA Securities, LLC

Fertitta Enterprises, Inc. (“Fertitta”), by and through its undersigned counsel, opposes USA Commercial Mortgage Company's motion for authority as loan servicer to accept payments and provide reconveyances for two Colt Gateway loans (Ct. Dkt. #s 2911-12, 2919-20 & 3011, Motion, Allison Decl., Errata, Allison Decl., & Suppl.). This initial response is made and based upon the following memorandum of points and authorities; the Declaration of William J. Bullard,

1 chief financial officer of Fertitta, filed contemporaneously with this opposition; all of the papers
 2 and pleadings on file herein; and all evidence adduced at the hearing on this matter.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I. INTRODUCTION**

5 Fertitta opposes this motion because there is insufficient evidence that Colt Gateway can
 6 pay off the loans. Colt Gateway has entered into a letter agreement with USA Commercial,
 7 agreeing to seek refinancing to pay off the loans. The agreement does not provide evidence that
 8 Colt Gateway can actually pay off the loans. When Fertitta asked Colt Gateway for a written
 9 confirmation letter for funding to refinance, Fertitta received a nonbinding and unexecuted letter
 10 agreement that expired six weeks ago.

11 Fertitta also opposes the motion because USA Commercial proposes reconveyance without
 12 a full payoff to Fertitta on the Colt Gateway #1 Loan. Fertitta, as a lender defined under the loan
 13 documents, is contractually entitled to default interest and late fees. Yet USA Commercial is not
 14 collecting any default interest with the payoff, and it does not disclose whether any late fees will
 15 be paid to Fertitta. Indeed, USA Commercial does not explain how it calculated the payoff or the
 16 allocation of the funds it collects at the payoff. Fertitta wants the Colt Gateway #1 Loan paid off
 17 and will work with debtors and others to accomplish this. But absent a full payoff with default
 18 interest and late fees, Fertitta is not required to reconvey the deed of trust.

19 **II. DISCUSSION & ANALYSIS**

20 **A. Procedural History**

21 On January 17, 2007, Fertitta and Tabas filed a motion for relief from the automatic stay to
 22 terminate the loan-servicing agreement for the Colt Gateway loan (Ct. Dkt. #2457). USA
 23 Commercial Mortgage Company, USA Capital Diversified Trust Deed Fund, LLC, and the
 24 Official Committee of Unsecured Creditors for USA Commercial Mortgage Company opposed the
 25 motion (Ct. Dkt. #s 2696-97, 2706), and Fertitta and Tabas replied (Ct. Dkt. #2742). On February
 26 15, 2007, the Court ordered debtors to file a motion for loan payoff on or before February 27,
 27 2007, set a status hearing for March 1, 2007, and continued the motion for stay relief until March
 28 15, 2007 (*See* Ct. Dkt. #2818, Virtual Minute Order).

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1 On February 27, 2007, debtors filed the underlying motion to accept payments and provide
 2 reconveyances (Ct. Dkt. #2911). Debtors also filed a supporting declaration from Thomas Allison
 3 (Ct. Dkt. #2912), an errata that clarified debtors were not collecting any default interest (Ct. Dkt.
 4 #2919), and a conforming declaration from Thomas Allison (Ct. Dkt. #2920). On March 1, 2007,
 5 the Court held a status hearing, ordered debtors to file their written agreement with the borrower,
 6 and continued the motion until March 15, 2007 (*See* Ct. Dkt. #2964, Virtual Minute Order). On
 7 March 7, 2007, debtors filed a letter agreement with the borrower (Ct. Dkt. #3011).

8 **B. There is insufficient evidence that Colt Gateway can pay off the loans.**

9 USA Commercial's proposal for a payoff by April 15, 2007, is not supported by Colt
 10 Gateway's ability to pay off the loans. The only evidence submitted by debtors concerning a
 11 payoff is a letter agreement between USA Commercial and Colt Gateway, stating that "Colt
 12 Gateway hereby undertakes to proceed with the loan refinancing and closing on or before April
 13 15, 2007, paying the then current amount due under the Loan Pay-Offs" (Ct. Dkt. #3011). This
 14 agreement is no better than an oral promise by Colt Gateway to pay off the loans, in terms of
 15 substantiating its ability to pay off the loans.

16 As of March 12, 2007, Colt Gateway does not have a binding or valid commitment letter
 17 for financing to pay off the loans. On that date, William J. Bullard, chief financial officer of
 18 Fertitta, spoke with Robert MacFarlane, president of Colt Gateway. Second Decl. of William
 19 Bullard, filed contemporaneously with this opposition. Mr. Bullard asked Mr. MacFarlane to
 20 provide him with any written commitment Colt Gateway has for financing to pay off the loans. *Id.*
 21 Mr. Bullard later received a fax from Mr. MacFarlane consisting of an nonbinding and expired
 22 letter offer from PRIF II Acquisition, LLC. *Id.*, Decl. Ex. 1. The letter states that it "constitutes
 23 neither an offer nor a commitment by PRIF in any form, but rather summarizes the terms of the
 24 proposed transaction." *Id.*, Decl. Ex. 1 at p. 2. Furthermore, it is not executed and states that the
 25 terms expired on January 29, 2007. *Id.*, Decl. Ex. 1 at p. 14.

26 The Court also is asked to approve a payoff without a guaranteed payoff date. As noted
 27 above, the letter agreement between USA Commercial and Colt Gateway simply states that Colt
 28 Gateway agreed to proceed with loan refinancing to close on or before April 15, 2007 (Ct. Dkt.

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1 #3011). This payoff date is contingent upon Colt Gateway's ability to refinance its loans, and
 2 there is no evidence in the record that Colt Gateway can actually pay off the loans.

3 Finally, USA Commercial has not explained how it calculated the payoff figures or how it
 4 intends to allocate any payoff to the individual lenders. Without supporting payoff calculations,
 5 Fertitta cannot assess whether USA Commercial is seeking the proper amount to pay off Colt
 6 Gateway #1 Loan. Similarly, without the individual allocations and supporting calculations,
 7 Fertitta cannot assess whether it will receive the amount it is owed on the Colt Gateway #1 Loan.

8 **C. Fertitta is entitled to default interest and late fees, and is not required to reconvey the
 deed of trust if it does not receive them.**

9 Even if there is a basis to find the Colt Gateway can pay off the loans, USA Commercial
 10 has not proposed a full payoff. Fertitta is contractually entitled to collect default interest and late
 11 fees owed under the loan documents. USA Commercial ignores Fertitta's rights and seeks a
 12 payoff without collecting Fertitta's default interest and late charges. Since USA Commercial is
 13 not seeking a full payoff, Fertitta is not required to reconvey the deed of trust.

14 Fertitta's right to default interest is a simple question of contract interpretation. *Accord*
 15 *Harrington Props., Inc. v. Peterson*, 973 P.2d 1004, 1007 (Utah App. 1999) (interpreting contract
 16 terms to determine rights to default interest). Because Fertitta did not enter into a loan-servicing
 17 agreement for the Colt Gateway #1 Loan, it is not subject to the contractual terms that USA
 18 Commercial imposed on the other lenders in this loan with the loan-servicing agreements (Ct. Dkt.
 19 #2457, Mtn. for Stay Relief at 3 & Ex. D, Subpoena & Strong email; Ct. Dkt. #2459, [First]
 20 Bullard Decl. ¶4.). Fertitta, as a lender as defined in the loan documents and is entitled to its
 21 contractual benefits.

22 Fertitta has not assigned or waived any of its rights as a lender on the note and, therefore,
 23 is entitled to default interest on the loan. The preamble to the promissory note defines Fertitta as a
 24 "Lender" and states that the "Borrower promise to pay to Lender . . . the principal sum . . . ,
 25 together with interest as provided herein." Ct. Dkt. #2457, Mtn. for Stay Relief, Ex. G, Note. The
 26 promissory note also provides that in the event of a default, "all amounts owing under the Note
 27 and all sums owing under the Loan Documents shall bear interest at a default rate equal to twenty
 28

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1 percent."¹ *Id.* at ¶9. The deed of trust also provides that the lender "shall have the right thereafter
 2 to insist upon the strict performance . . . of any and all of the terms and provisions of this
 3 mortgage or the note secured hereby." Ct. Dkt. #2457, Mtn. for Stay Relief, Ex. H, Mortgage
 4 Deed at 5.

5 Fertitta never assigned or waived its right to collect interest at the default rate. Second
 6 Bullard Decl. Although default interest under the note is discretionary, a lender only foregoes
 7 default interest with an affirmative and express waiver. *Harrington Properties*, 973 P.2d at 1009-
 8 10; *Meyers Way Dev. Ltd. P'ship v. University Sav. Bank*, 910 P.2d 1308, 1318 (Wash. App.
 9 1996), *citing Wagner v. Wagner*, 621 P.2d 1279 (Wash. 1980). Again, Fertitta has not
 10 affirmatively or expressly waived default interest on this loan, and USA Commercial has no
 11 authority to waive the default interest on Fertitta's behalf.

12 Default interest is significant on the Colt Gateway #1 Loan because it has been in default
 13 for more than three years ago. The original note is dated December 22, 2002. Ct. Dkt. #2457,
 14 Mtn. for Stay Relief, Ex. G, Note. The note, by its own terms, matured one year later on
 15 December 22, 2003. *Id.* at ¶3. Fertitta has not authorized, seen, or executed an extension of the
 16 note. Second Bullard Decl. The failure to pay the loan at maturity is an event of default under the
 17 note. Ct. Dkt. #2457, Mtn. for Stay Relief, Ex. G, Note at ¶7. Therefore, the borrower owes
 18 Fertitta default interest since December 23, 2003. There is no full payoff unless Fertitta receives
 19 the default interest.

20 Colt Gateway owes \$310,688.57 in default interest from January 1, 2004, through
 21 February 28, 2007, based on the 5 percent increase in the interest rate after Colt Gateway's default
 22 and the figures in the investor history report from by USA Commercial. Second Bullard Decl. &
 23 Ex. 2, Spreadsheet & Report. This figure is the amount accrued for all lenders on the Colt
 24 Gateway #1 Loan. *Id.* Fertitta funded \$4 million of the \$8.7-million Colt Gateway #1 Loan and,
 25 as such, has a 45.97 percent interest in the payoff and default interest. Based on that share,
 26 Fertitta is entitled to \$142,823.53 in default interest.

27
 28 ¹ Default interest is 5 percent greater than the loan's standard interest rate of 15 percent. Ct. Dkt.
 #2457, Mtn. for Stay Relief, Ex. G, Note at ¶¶ 1, 9.

1 Fertitta also is entitled to late charges. The promissory note provides that the borrower
 2 owes the lenders a late fee of five percent of the amount owed if payments are delinquent,
 3 including the failure to pay off the loan at maturity. *Id.* at ¶8. Fertitta never waived any late fees
 4 owed by the borrower. Second Bullard Decl. Thus, the borrower owes late fees to Fertitta. In
 5 this case, Colt Gateway owes all lenders \$163,069.69 in late fees, pursuant to the terms of the loan
 6 documents that impose a 5 percent late charge on the outstanding balance when Colt Gateway
 7 default because it did not pay off the loan at maturity. Second Bullard Decl. Based on Fertitta's
 8 45.97 percent interest and the terms of the loan documents, Colt Gateway owes Fertitta
 9 \$74,963.13 in late charges. Although USA Commercial's errata to the motion states that it is
 10 collecting \$89,937.41 in late fees on the Colt Gateway #1 Loan, the errata does not specify
 11 whether USA Commercial intends to provide those fees to Fertitta. There is no full payoff unless
 12 Fertitta receives the late charges.

13 The arrangement presented to the court, without default interest and late charges paid to
 14 Fertitta, is nothing more than a partial payoff. Although Nevada allows a partial discharge for a
 15 partial payoff, NRS 107.078, that is not the case here. USA Commercial seeks a complete
 16 discharge and reconveyance for a partial payoff. But there is no duty to reconvey in the event of a
 17 partial payoff. See Harry D. Miller, 4 *Miller & Starr California Real Estate* § 10:113 at 349 &
 18 n.12 (3d ed. 2000), *citing Stub v. Belmont*, 20 Cal.2d 208, 215, 124, P.2d 826 (1942). Since USA
 19 Commercial has not proposed a payoff of the full amount owed to Fertitta, Fertitta is not required
 20 to reconvey the deed of trust.

21 USA Commercial ignores Fertitta's rights with its motion. By attempting to waive
 22 Fertitta's default interest and late charges, USA Commercial seeks to subrogate Fertitta's rights in
 23 those funds to the lenders in the second-tier loan. Furthermore, Fertitta's secured rights in the
 24 default interest and late fees also are being subrogated to USA Commercial's unsecured right to a
 25 \$1.7-million origination fee, which will be paid in full under the terms contained in the motion.
 26 Again, Fertitta is not required to reconvey the deed of trust to the borrower unless it receives a full
 27 payoff including default interest and late charges.

28

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III. CONCLUSION

2 USA Commercial's motion should be denied because there is insufficient evidence that
3 Colt Gateway can pay off the loans. USA Commercial submits a letter in which Colt Gateway
4 agreed to proceed with refinancing, and Fertitta received a stale, nonbinding and unexecuted
5 agreement when it asked Colt Gateway for a commitment letter to pay off the loans. Regardless,
6 the proposed payoff violates Fertitta's contractual rights as a lender to default interest and late fees.
7 Nearly \$475,000 in default interest and late charges have accrued. Fertitta, as the holder of almost
8 46 percent interest in the loan, is entitled to more than \$217,000. Fertitta has never assigned or
9 waived its rights to those monies. Yet USA Commercial proposed a payoff that does not include
10 Fertitta's default interest and late fees. This is unacceptable, and Fertitta is not required to
11 reconvey the deed of trust unless it receives a full payoff including its share of the default interest
12 and late fees.

DATED this 12th day of March, 2007.

JONES VARGAS

//s//Louis M. Bubala III

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CERTIFICATE OF SERVICE

1. On March 12, 2007, I served the following document(s):

**FERTITTA ENTERPRISES, INC.'S OPPOSITION TO
DEBTORS' MOTION TO AUTHORIZE DEBTOR USA COMMERCIAL MORTGAGE
COMPANY AS LOAN SERVICER TO ACCEPT PAYMENTS AND PROVIDE
RECONVEYANCES FOR TWO COLT GATEWAY LOANS,
WITH CERTIFICATE OF SERVICE**

2. I served the above-named document(s) by the following means to the persons as listed below:

- a. **ECF System** (attach the "Notice of Electronic Filing" or list all persons and addresses):

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3 bkecf@nevadafirm.com;mbarnes@nevadafirm.com,paltstatt@nevadafirm.com

4 9 b. **United States mail, postage fully prepaid** (list persons and addresses):

5 9 c. **Personal Service** (list persons and addresses):
6 I personally delivered the document(s) to the persons at these addresses:

7 9 For a party represented by an attorney, delivery was made by
8 handing the document(s) to the attorney or by leaving the document(s) at
9 the attorney's office with a clerk or other person in charge, or if no one is in
10 charge by leaving the document(s) in a conspicuous place in the office.

11 9 For a party, delivery was made by handing the document(s) to the
12 party or by leaving the document(s) at the person's dwelling house or usual
13 place of abode with someone of suitable age and discretion residing there.

14 ■ d. **By direct email (as opposed to through the ECF System)** (list persons
15 and email addresses):

16 **Frank Merola, Eve Karasik & Christine M. Pajak**

17 fmerola@stutman.com: ekarasik@stutman.com; cpajak@stutman.com

18 **Marc A. Levinson & Lynn Trinka Ernce**

19 malevinson@orick.com;lernce@orrick.com

20 **Andrew Welcher c/o William E. Winfield,**
21 wwinfield@nchc.com

22 **Steven C. Strong, & Douglas M. Monson**
23 sstrong@rqn.com; dmonson@rqn.com

24 **Leonard E. Schwartzter**
25 Lschwartzter@s-mlaw.com

26 **Susan M. Freeman**
27 sfreeman@lrlaw.com

28 **August B. Landis**
29 Augie.landis@usdoj.gov

30 **Nevada Mortgage Lending Division**
31 **Attn: Susan Eckhardt**
32 seckhardt@mld.nv.gov

33 Based upon the written agreement of the parties to accept service by email
34 or a court order, I caused the document(s) to be sent to the persons at the
35 email addresses listed below. I did not receive, within a reasonable time
36 after the transmission, any electronic message or other indication that the
37 transmission was unsuccessful.

38 9 e. **By fax transmission** (list persons and fax numbers):

JONES VARGAS
100 W. Liberty Street, 12th Floor
P.O. Box 281
Reno, Nevada 89504-0281
Tel: (775) 786-5000 Fax: (775) 786-1177

1 Based upon the written agreement of the parties to accept service by fax
2 transmission or a court order, I faxed the document(s) to the persons at the
3 fax numbers listed below. No error was reported by the fax machine that I
4 used. A copy of the record of the fax transmission is attached.

5 9 f. **By messenger:**

6 I served the document(s) by placing them in an envelope or package
7 addressed to the persons at the addresses listed blow and providing them to
8 a messenger for service. (A declaration by the messenger must be attached
9 to this Certificate of Service).

10 **I declare under penalty of perjury that the foregoing is true and correct.**

11 DATED this 12th day of March, 2007.

12 Louis M. Bubala III

13 Name

14 //s// Louis M. Bubala III

15 Signature

16 JONES VARGAS
17 100 W. Liberty Street, 12th Floor
18 P.O. Box 281
19 Reno, Nevada 89504-0281
20 Tel: (775) 786-5000 Fax: (775) 786-1177